Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

AMERITAS INVESTMENT CORP., a Nebraska Corporation f/k/a BLN INVESTMENT CORP.,
Petitioner,

v.

STEVEN M. SLINKARD, An Individual,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF OKLAHOMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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76 pp

QUESTIONS PRESENTED FOR REVIEW

1. Where a Plaintiff a) filed a lawsuit in an Oklahoma state court eventually alleging only state law causes of action; b) that case was ordered to arbitration by a state court judge; c) the arbitrators rendered their award citing Oklahoma state laws as the basis for their award; and d) the award was confirmed by a state court judge, will the entirety of Oklahoma state law be pre-empted by the Federal Arbitration Act and an award permitted to be entered contrary to state law simply because the case in some way involves interstate commerce?

2. By failing to permit any meaningful review of the arbitrators' decision on punitive damages or attorney's fees, was Ameritas Investment Corp. denied due process as guaranteed by the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Petitioner: Ameritas Investment Corp., f/k/a BLN Investment Corp.

Parent Company of Petitioner: AMAL Corporation

Subsidiary Companies of Petitioner: None

Respondent: Steven M. Slinkard

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES 1

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT 1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE . . 2

CONCISE STATEMENT OF THE CASE SETTING OUT FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED 3

A. SUMMARY OF FACTS 3

B. HISTORY OF WHEN FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED 5

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT 9

A. SUMMARY OF ARGUMENT 9

B. ARGUMENT 10

1. Federal Arbitration Act Pre-emption 10
2. Due Process 23

CONCLUSION 29

APPENDIX

N.A.S.D. Award, 12-09-93 . . . . . 1A

Judgment, District Court of Oklahoma County, Oklahoma, 03-29-94 . . . . . 8A

Memorandum Opinion of the Court of Appeals of the State of Oklahoma, 10-31-95 . . . . . 12A

Order of the Supreme Court of the State of Oklahoma, 03-25-96 . . . . . 23A

Okla. Stat. tit. 15, §810 . . . . . 25A

Okla. Stat. tit. 15, §812 . . . . . 26A

Okla. Stat. tit. 23, §9 . . . . . 28A

Okla Const. art. 2, §7 . . . . . 29A

Okla Const. art. 32, §8 . . . . . 30A

U.S. Const. amend. XIV, §1 . . . . . 31A

9 U.S.C. §2 . . . . . 32A

9 U.S.C. §10 . . . . . 33A

TABLE OF AUTHORITIES

CASES:

Allied-Bruce Terminix Co., 115 S. Ct. 834, 838 (1995) 9,17,19,21

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278, 109 S. Ct. 2909, 2922, 106 L. Ed. 3d 219 (1989) 15

BMW of North America, Inc. v. Gore, 1996 WL 262429 (U.S.) 11,24

Casarotto v. Lombardi, 268 Mont. 369, 886 P.2d 931 (1994) 20

Commonwealth v. Perkins, 342 Pa. 529, 21 A.2d 45, aff'd, 314 U.S. 586 (1941) 28

Daniels v. Williams, 474 U.S. 327, 331 (1986) 25

Dean Witter Reynolds, Inc. v. Trimble, 631 N.Y.S.2d 215 (1995) 16

Dent v. West Virginia, 129 U.S. 114, 123, 9 S. Ct. 231, 32 L. Ed. 623 (1889) 25

Doctors' Associates, Inc. v. Casarotto,
___ U.S. ___, 115 S. Ct. 2552,
132 L. Ed. 2d 807 (1995) 21

Fahnestock & Co. v. Waltman, 935 F.2d 512 (2nd
Cir. 1991), cert. denied, 112 S. Ct. 1241 (1992) . . . 14

Garrity v. Lyle Stuart, Inc., 386 N.Y.S.2d
831, 353 N.E.2d 793 (1976) 15

Hines v. Davidowitz, 312 U.S. 52, 67,
61 S. Ct. 399, 404, 85 L. Ed. 581 (1941) 14,15

Hyde Park Partners, L.P. v. Connolly,
839 F.2d 837, 849 (1st Cir. 1988) 12

Lee v. Chica, 983 F.2d 883 889 (8th Cir. 1993) . . . 26

Louisiana Public Service Comm'n v. FCC,
476 U.S. 355, 368-69, 106 S. Ct. 1890,
1898-99, 90 L. Ed. 2d 369 (1986) 12

Mastrobuono v. Shearson Lehman Hutton, Inc.,
115 S. Ct. 1212 (1995) 16,17,18

New England Energy, Inc. v. Keystone
Shipping Co., 855 F.2d 1 (1st Cir. 1988) 13

Oberg v. Honda Motor Company,
114 S. Ct. 2331 (1994) 5,7,10,23

Pacific Mutual Life Insurance Co. v.
Haslip, 111 S. Ct. 1032 (1991) 24,25

Parker v. Brown, 317 U.S. 341 (1943) 28

Perry v. Thomas, 482 U.S. 483, 491 (1987) 9,14

Railway Express Agency, Inc. v.
New York, 336 U.S. 106, 112,
69 S.Ct. 463, 93 L. Ed. 533 (1949) 26

Shu-Tao Lin v. McDonnell Douglas Corp.,
742 F.2d 45, 49 n.5. (2d Cir. 1984) 15

Societe Generale de Surveillance v. Raytheon,
643 F.2d 863, 867 (1st Cir. 1981) 12,13

Southland Corp. v. Keating,
465 U.S. 1, 10 (1984) 9,13,14,19,20

Thorneburg Hosiery Co. v. G. L. Wilson
Building Company, 381 S.E.2d 718
(N.C. App. 1989) 22

United States v. Darby, 312 U.S. 100 (1941) 28

Van Gemert v. Boeing Co., 553 F.2d 812,
813 (2d Cir. 1977) 15

Volt Information Services, Inc. v.
Board of Trustees of Leland Stanford
Junior University, 489 U.S.
468, 477 (1989) 9,13,14,18,20,21,28

STATUTES AND RULES:

Sup. Ct. R. 10(b) 1

Sup. Ct. R. 10(c) 1

Sup. Ct. R. 29.4(b) 1

Sup. Ct. R. 29.4(c) 1

Okla. Stat. tit. 15, §801, et. seq. 6,9

Okla. Stat. tit. 15, §810 2,4,5,6,23

Okla. Stat. tit. 15, §812 2,10,23,26

Okla. Stat. tit. 23, §9 2,3,4,5,6,8,9,21,22,23,26

Okla. Stat. tit. 71, §408 3,22

Okla. Const. art. 2, §7 2

Okla. Const. art. 23, §8 2,26

U.S. Const. amend. X 28

U.S. Const. amend. XIV, §1 2,7,23,24

9 U.S.C. §1, et. seq.
(Federal Arbitration Act) i,5,6,7,9,10,11,12,
13,14,15,16,17,18,
19,20,21,23,26,28

9 U.S.C. §2 2,6

9 U.S.C. §10 2,10

PUBLICATIONS

Stewart, Punitive Damages Arbitration:
Fish or Cut Bait, N.Y.L.J.,
Feb. 21, 1991, at 5, col. 1. 15

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

No such opinions and orders were or have been published. The only opinion that was to have been published was the 2-1 opinion of the Oklahoma Court of Appeals which was ordered withdrawn from publication by the Supreme Court of the State of Oklahoma on March 25, 1996.

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

(i) The Order sought to be reviewed is an Order by the Supreme Court of the State of Oklahoma denying Ameritas Investment Corp.'s Petition for Certiorari, which Order is dated March 25, 1996.

(ii) No Orders respecting rehearing or extension of time have been entered.

(iii) No cross-petition for a writ of certiorari is being filed.

(iv) Rules 10(b) and 10(c) of the Rules of the Supreme Court of the United States confer on this Court's jurisdiction to review on a writ of certiorari the Order in question.

(v) No notifications pursuant to Sup. Ct. R. 29.4(b) or (c) are required, as the constitutionality of an Act of Congress or a statute of the state of Oklahoma has not been drawn into question.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Okla. Stat. tit. 15, §810

Okla. Stat. tit. 15, §812

Okla. Stat. tit. 23, §9

Okla. Const. art. 2, §7

Okla. Const. art. 23, §8

U.S. Const. amend. XIV, §1

9 U.S.C. §2

9 U.S.C. §10

CONCISE STATEMENT OF THE CASE SETTING OUT FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

A. SUMMARY OF FACTS

On March 22, 1991, Mr. Steven M. Slinkard ("Mr. Slinkard") filed a lawsuit in the District Court of Oklahoma County, State of Oklahoma. This lawsuit alleged that certain securities were sold to Mr. Slinkard by Mr. Steven McQueen ("Mr. McQueen"), allegedly an agent of Ameritas Investment Corp. ("AIC"), and also alleged various Oklahoma state statutory and state common law violations by Mr. McQueen and AIC. Because Mr. Slinkard had entered into an Option Agreement with AIC, AIC asked the District Court of Oklahoma County to stay that lawsuit and to compel arbitration. On February 27, 1992, the Motion was granted and the case proceeded to arbitration.

On September 20, 1993, Mr. Slinkard filed his First Amended Claim in the arbitration proceeding alleging violations of Sections 301 and 408 (a)(1) of the Oklahoma Securities Act (Count I); Section 408 (a)(2) of the Oklahoma Securities Act (Count II); Breach of Fiduciary Duty (Count III); Common Law Fraud (Count IV); and Gross Negligence (Count V). The arbitration was held from September 20, 1993, to September 23, 1993.

On December 9, 1993, the panel made an Award to Mr. Slinkard of $238,571.59 which consisted of the following: a) actual damages ($40,500.00); b) punitive damages ($100,000.00) pursuant to Okla. Stat. tit. 23, §9; c) attorney's fees ($71,452.13) pursuant to Okla. Stat. tit. 71, §408; d) costs ($4,142.76); and e) pre-judgment interest

($22,476.70) plus interest on the amount of actual damages awarded ($40,500.00) at 10 percent from September 23, 1993, until the actual damages were paid in full.

Although citing to Okla. Stat. tit. 23, §9, the arbitration panel failed to comply with that statute which mandates that, in order to support any award of punitive damages in excess of actual damages (here $40,500.00), there must be a finding by a court, on the record:

> that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice . . .

Likewise, the arbitration panel, in awarding attorneys fees of $71,452.13 (even though the actual damages were only $40,500.00), simply ignored Okla. Stat. tit. 15, §810 which prohibits the awarding of attorneys fees as part of an arbitration award.

Nonetheless, on March 29, 1994, Judge John M. Amick of the District Court of Oklahoma County, Oklahoma affirmed the arbitration panel's award and entered a Judgment in favor of Mr. Slinkard.

The matter was timely appealed to the Oklahoma Supreme Court on April 8, 1994. On April 11, 1995, the Oklahoma Supreme Court assigned the appeal to the Oklahoma Court of Appeals. By a 2-1 published decision on October 31, 1995, the Oklahoma Court of Appeals essentially affirmed the District Court Opinion.

On November 17, 1995, Ameritas Investment Corp. filed a Petition for Certiorari with the Oklahoma Supreme Court.

On March 25, 1996, the Writ was denied; however, the Oklahoma Supreme court also removed the Oklahoma Court of Appeals decision from publication.

B. HISTORY OF WHEN FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

A summary of the two questions sought to be reviewed are:

1. The scope of the pre-emptive effect of the Federal Arbitration Act.

2. The effect of the case of Oberg v. Honda Motor Company, 114 S. Ct. 2331 (1994), on an arbitration proceeding.

As to the first question, the original award by the arbitrators dated December 9, 1993, contained no references to the Federal Arbitration Act ("FAA"). The panel awarded damages solely based on Oklahoma state law but failed to make the "wanton or reckless disregard for the rights of another, oppression, fraud or malice" finding required by Okla. Stat. tit. 23, §9 and awarded attorneys fees although such an award is prohibited by Okla. Stat. tit. 15, §810.

In any event, the first time that the issue of FAA pre-emption was raised was in Mr. Slinkard's Motion to Affirm the Arbitration Award filed on February 15, 1994. AIC, at its first possible opportunity, raised the issue on the first page of its Reply to Mr. Slinkard's Motion to Affirm filed

with the District Court of Oklahoma County on March 3, 1994: "The present action is not pre-empted by the Federal Arbitration Act ("FAA"), but is governed by Oklahoma law..." On March 29, 1994, the District Court of Oklahoma County, Oklahoma granted Mr. Slinkard's Motion to Affirm finding in its Order specifically that pursuant "to the Federal Arbitration Act, the arbitrators did not exceed their authority." This was the first time the trial court had made any reference to the Federal Arbitration Act.

The matter was timely appealed to the Oklahoma Supreme Court on April 8, 1994. The assignments of error by AIC were as follows:

1. The arbitration proceeding was governed by the Oklahoma Uniform Arbitration Act, Okla. Stat. tit. 15, §801, et. seq., not the Federal Arbitration Act ("FAA"), 9 U.S.C. §1, et. seq.
2. Punitive damages were awarded by the arbitrators in excess of their powers.
3. Attorneys' fees and prejudgment interest were awarded by the arbitrators in excess of their powers.

On October 31, 1995, the Order of the District Court was affirmed in part and reversed in part (on the issue of appellate attorneys fees) by the Court of Appeals of the State of Oklahoma. That Opinion (although later withdrawn from publication by the Oklahoma Supreme Court), found, as a matter of law, that Okla. Stat. tit. 15, §810 (pertaining to attorneys fees in arbitration) and Okla. Stat. tit. 23, §9 (pertaining to procedure for awarding punitive damages in

the state of Oklahoma) were pre-empted by the Federal Arbitration Act. In its Petition for Certiorari to the Oklahoma Supreme Court AIC again raised the FAA pre-emption issue:

> The Court of Appeals failed to follow applicable precedent, including decisions of the United States Supreme Court, and erred in holding that the FAA pre-empts all state laws on arbitration in all cases involving interstate commerce.

As to the due process issue explained in the Oberg case, that United States Supreme Court case was not decided by this Court until June 24, 1994, which was after this case had been appealed from the District Court of Oklahoma County, Oklahoma to the Oklahoma Supreme Court. That case, therefore, was not cited by Ameritas Investment Corp. until its Reply Brief to the Oklahoma Supreme Court which was filed on December 16, 1994. The due process argument is contained in that Reply Brief as follows:

> Moreover, the United States Supreme court in the recent case of Honda Motor Co., Ltd., ___ U.S. ___, 114 S. Ct. 2331 (1994), has held that any statutory system which does not adequately safeguard against arbitrary awards of punitive damages is violative of the Fourteenth Amendment's Due Process Clause. AIC believes it is clear that such "adequate safeguards" are not present in this case.

However, from the time of AIC's filing on January 7, 1994, of its Motion to Vacate Arbitration Award, AIC has continuously made the argument that, even if the arbitrators were empowered to award punitive damages, it would be improper for them to do so without complying with Okla. Stat. tit. 23, §9. In its Petition for Certiorari, AIC set forth as Question Presented Number (2):

> The Court of Appeals failed to address AIC's constitutional argument. AIC believes that by failing to permit any meaningful review of the arbitrator's decision on punitive damages or attorneys fees, AIC was denied due process, which Constitutional right cannot be waived.

In any event, the issue was squarely before the Oklahoma Supreme Court and the Court of Appeals of the State of Oklahoma prior to the Court of Appeals decision dated October 31, 1995, and certainly prior to the Oklahoma Supreme Court's denial of certiorari on March 25, 1996.

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. SUMMARY OF ARGUMENT

The present action is not pre-empted by the FAA, but is governed by Oklahoma law, specifically by the Oklahoma Uniform Arbitration Act, Okla. Stat. tit. 15, §801, et. seq. and the Oklahoma statute on punitive damages Okla. Stat. tit. 23, §9.

The Federal Arbitration Act was enacted in 1925 to ensure that courts enforced agreements to arbitrate. Allied-Bruce Terminix Co., 115 S. Ct. 834, 838 (1995). This Court has held that the "FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." Volt Information Services, Inc. v. Board of Trustees of Leland Standford Junior University, 489 U.S. 468, 477 (1989). Indeed, Congress expressly limited the pre-emptive reach of the FAA by allowing states to invalidate arbitration provisions "on such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. §2.

This Court has held that only state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration" are pre-empted. Southland Corp. v. Keating, 465 U.S. 1, 10 (state law that made agreements to arbitrate certain franchise claims unenforceable held pre-empted because it "directly conflicts" with section 2 of the Act); Perry v. Thomas, 482 U.S. 483, 491 (1987) (similar state law barring enforcement

of agreement to arbitrate wage-collection claims held pre-empted because it was in "unmistakable conflict" with federal policy).

Therefore, since Mr. Slinkard chose to litigate solely state law issues in a state forum and is complaining only of state statutory and state common law causes of action, and because the arbitrators themselves supported their award by reference to Oklahoma state statutes, state law applies to the issue of the remedies available to Mr. Slinkard. If Oklahoma state statutory law had been applied in this case, the arbitration panel would not have been able to award punitive damages, attorneys' fees, or interest in the manner that it did.

Secondly, as can be seen from an examination of Okla. Stat. tit. 15, §812 (listing the sole bases for vacating an arbitration award) or 9 U.S.C. §10 (the FAA version), the permitted grounds for vacating an arbitration award are exceedingly narrow. As such, these statutes simply do not provide the type of procedural due process required to justify an award of punitive damages. Oberg v. Honda Motor Company, 114 S. Ct. 2331 (1994).

B. ARGUMENT

1. Federal Arbitration Act Pre-emption

In this case the "contract" providing for arbitration, an Option Agreement (in paragraph 13), while requiring arbitration, does not give the arbitrators any express authority except to award actual damages. In any event, it

is undisputed that the Option Agreement did not authorize the arbitrators to award punitive damages, attorneys' fees, or interest nor did it contain a choice of laws provision. The defendant, aware of Oklahoma state law a) requiring a finding by a Court of "wanton or reckless disregard for the rights of another, oppression, fraud or malice" before an award of punitive damages in excess of actual damages could; and b) prohibiting an award of attorneys fees or interest by arbitrators, sought arbitration.

As this Court recently held:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice, not only of the conduct that will subject him to punishment but also of the severity of the penalty that a state may impose.

BMW of North America, Inc. v. Gore, 1996 WL 262429, 262437 (U.S.).

Here such "fair notice" was absent in that the arbitrators failed to follow Oklahoma law.

A major underpinning of Mr. Slinkard's argument has been that all Oklahoma laws are pre-empted by the FAA simply because this case involved interstate commerce. AIC suggests that this is not a correct proposition of law. Because state law cannot be used to "defeat arbitration," pre-emption occurs only when a state law affects arbitrability. Arbitrability is not at issue here, however, because neither of the parties have disputed the arbitrability of this matter

and because the Oklahoma state statutes, as does the FAA, favor arbitrability. As the First Circuit held in 1988:

> We note first that, even when federal law applies to an arbitration agreement [footnote omitted], the Federal Arbitration Act has never been construed to pre-empt all state law on arbitration. We do not read the recent series of Supreme Court arbitration cases to establish such a proposition by implication. Those cases concerned only laws that would override the parties' choice to arbitrate rather than litigate in court, in direct conflict with the Act's primary purpose of ensuring the enforcement of privately negotiated arbitration agreements. . . . At best, the Supreme Court's decisions support a conclusion that all state laws seeking to limit the use of the arbitral process are superseded by federal law. None of the various pre-emption standards suggests that Congress intended the federal Act to supersede all state arbitration law, and appellee Keystone does not argue to the contrary. See Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 849 (1st Cir. 1988) (detailing the "variants" of the pre-emption doctrine, quoting Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 1898-99, 90 L. Ed. 2d 369 (1986)). See also Societe Generale de Surveillance v. Raytheon, 643 F.2d 863, 867

(1st Cir. 1981) (Federal Arbitration Act pre-empts "only that state law inconsistent with its express provisions").

New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1 (1st Cir. 1988).

The "standard of review" in a case where one of the ultimate issues is pre-emption, i.e., whether or not federal law or state law applies, has been enunciated by this Court in Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989). In that case the parties had in their contract an agreement to arbitrate all disputes between the parties "arising out of or relating to this contract or the breach thereof." The contract also contained a choice-of-law clause providing that "[t]he Contract shall be governed by the law of the place where the Project is located." In the course of that litigation, the issue arose as to whether the FAA pre-empted a specific California state statute:

> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). See, e.g., id., at 10-16 (finding pre-empted a state statute which rendered agreements to arbitrate certain franchise

> claims unenforceable); Perry v. Thomas, 482 U.S., at 490 (finding pre-empted a state statute which rendered unenforceable private agreements to arbitrate certain wage collection claims). But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself (emphasis added).

Several Circuit Courts of Appeal have followed up on the logic of Volt. For example, the Second Circuit in Fahnestock & Co. v. Waltman, 935 F.2d 512 (2nd Cir. 1991), cert. denied, 112 S. Ct. 1241 (1992), held as follows:

> While it is true that in enacting the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," Southland Corp. v. Keating, 465 U.S. 1, 16, 104 S.Ct. 852, 861, 79 L.Ed.2d 1 (1984), it also is true that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration," Volt Info. Sciences v. Board of Trustees of the Leland Stanford Jr. Univ., 489 U.S. 468, 477, 109 S.Ct. 1248, 1254, 103 L.Ed.2d 488 (1989). Accordingly, state law may be applied in arbitration matters, subject to pre-emption only "to the extent that it actually conflicts with federal law." Id.; see also Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399,

404, 85 L. Ed. 581 (1941) (pre-emption is found in cases where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."). We find no conflict between the provisions of the FAA and the Garrity rule.

. . .

Ordinarily, "[i]n a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question . . . [is a] question[] of state law." Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278, 109 S. Ct. 2909, 2922, 106 L. Ed. 2d 219 (1989). The measure of damages in general is a matter controlled by New York substantive law where federal jurisdiction in New York is predicated on the diversity of the parties. See Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 49 n.5. (2d Cir. 1984); Van Gemert v. Boeing Co., 553 F.2d 812, 813 (2d Cir. 1977). It follows that in this action the Garrity rule prohibiting the award of punitive damages by arbitration must be applied. That the rule is grounded in state policy concerns renders it no less a rule of substantive law. See Stewart, Punitive Damages Arbitration: Fish or Cut Bait, N.Y.L.J., Feb. 21, 1991, at 5, col. 1.

Certainly if state law applies in a diversity federal court action, all the more does it follow that it would control in a purely state court action. Therefore, it seems clear that Oklahoma state law controls here.

The recent case of Dean Witter Reynolds, Inc. v. Trimble, 631 N.Y.S.2d 215 (1995), although, of course, not binding on this Court, is virtually identical with this case and very logically holds that, even in a case involving interstate commerce, state law of the state where the arbitration takes place applies and, therefore, that the FAA simply does not pre-empt all state law. In Trimble, most of the facts are the same as in the instant case. Furthermore, the New York Court in Trimble noted this Court's opinion in Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 112 (1995), but ruled that it had no effect on its outcome since the Trimble case simply did not involve contract interpretation concerning a choice of law provision. It was also conceded in Trimble that that case involved interstate commerce, however, the Plaintiff had filed for arbitration in New York. Here, there is an even more compelling case for state law as controlling, as here Mr. Slinkard filed a lawsuit in state court in Oklahoma and did not simply commence arbitration. AIC believes that the logic in Trimble is persuasive. And, in any event, AIC believes that this case and Trimble, among others, highlight the fact that the issue of which law to apply when a lawsuit or arbitration is commenced in a particular state, even if the matter involves interstate commerce, is unsettled.

Mr. Slinkard's counsel has argued that two recent decisions of this court control the outcome of this case. AIC simply does not believe that to be the case.

In Allied-Bruce Terminix Co., 115 S. Ct. 834,838 (1995), the issue was narrow. Prior to that case, it was clear that the issue of arbitrability was to be determined by whether or not a transaction in interstate commerce was contemplated at the time the parties entered into the contract. If so, the Federal Arbitration Act ("FAA") would pre-empt state law to the extent that state law absolutely prevented arbitration. All that the Allied-Bruce Terminix case made clear is that if a transaction or a series of actions between parties in fact turned out to involve interstate commerce (even if not contemplated at the time the contract was entered into), the FAA would dictate that arbitration must take place. The only issue was arbitrability. Allied-Bruce Terminix had no further precendental value as to what rules that arbitration could utilize. In the present case, there is no issue as to arbitrability. In fact, it was AIC who moved to arbitrate the matter. Therefore, AIC believes that the Allied-Bruce Terminix case has no bearing on this appeal.

In Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995), a federal court case, the issue was different; but the effect on this appeal is the same. That case involved an arbitration agreement between the parties which apparently had two conflicting clauses. One of those clauses purported to identify the scope of the arbitrator's powers. The arbitration agreement also contained a conflicts of law provision indicating that New York law would control. The Mastrobuono case arose out of a federal court in Illinois.

Here, of course, the facts are dramatically different. There is no choice of law provision in the contract. More importantly, the case began with a petition by the Plaintiff in a state court in Oklahoma seeking relief based upon state law

causes of action. Accordingly, any reliance upon Mastrobuono in this appeal would be misplaced. AIC believes that Mr. Justice Thomas' dissent in Mastrobuono accurately explained the "scope" of that decision:

> Thankfully, the import of the majority's decision is limited and narrow. The case amounts to nothing more than a federal court applying Illinois and New York contract law to an agreement between parties in Illinois. Much like a federal court applying a state rule of decision to a case when sitting in diversity, the majority's interpretation of the contract represents only the understanding of a single federal court regarding the requirements imposed by state law. As such, the majority's opinion has applicability only to this specific contract and to no other. But because the majority reaches an erroneous result on even this narrow question, I respectfully dissent.

Here the ultimate issue is whether or not a state arbitration proceeding brought pursuant to state law is, in fact, governed by Oklahoma state law. Ameritas believes that it is clear that it is. In fact, this Court in Mastrobuono again cited the case of Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989), which held that "it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." AIC

believes that there is no support for the position that the FAA entirely pre-empts all other state statutes especially in a case commenced in state court and dealing solely with state law claims.

This Court has grappled with the issue of the pre-emptive effect of the FAA for almost 13 years. In the case of Southland Corp. v. Keating, 465 U.S. 1 (1983), this Court initially decided the issue of whether or not the Federal Arbitration Act even applied at all to state court cases. In that case, over a vigorous dissent by Justice O'Connor in which Chief Justice Rehnquist joined, the Court found that, at least on the facts of that case, the FAA to some extent did apply to some cases filed in a state court. Justice O'Connor, however, in her dissent stated that the Court's decision in Southland Corp.:

> . . .is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear Congressional intent underlying the FAA. Congress intended to require Federal, not State, courts to respect arbitration agreements.

Therefore, in the case of Allied Bruce Terminix Co. v. Dobson, ____ U.S. __, 115 S.Ct. 834, 130 L. Ed. 2d 753 (1995), although Justice O'Connor concurred in the result, she continued to state her opinion that "Congress never intended the Federal Arbitration Act to apply in State courts." Also, in the Allied Bruce Terminix case, Justice Scalia dissented along with Justice Thomas; specifically stating that "Southland clearly misconstrues the Federal

Arbitration Act." Justice Scalia went so far as to say that while he would not in the future dissent from judgments that rest on Southland, he "will, however, stand ready to join four Justices in overruling it, since Southland will not become more correct over time."

Since at least four Justices of this Court are on record as questioning the validity of Southland, AIC believes this Court should strongly consider overruling Southland. Even if this Court does not go that far, AIC believes that this Court should re-affirm the basic principle of Volt and clarify the limited extent of pre-emption by the FAA in state court cases, i.e., only as to questions of arbitrability of the entire matter. AIC further believes that the facts of this case are compelling enough for this Court to find that there is simply no support for a FAA pre-emption of all Oklahoma law in a case such as this one where:

a) Plaintiff filed a case in state court alleging only state law causes of action;
b) That case was ordered to arbitration by a state court judge;
c) The arbitrators rendered their award citing state law as a basis for their award;
d) The award was confirmed by a state court judge.

In 1994, the Supreme Court of Montana in Casarotto v. Lombardi, 268 Mont. 369, 886 P.2d 931 (1994), held that a state law requiring notice of an arbitration agreement on the first page of the contract was not pre-empted by the

FAA. This Court recently decided the appeal of that case on May 20, 1996 (Doctors' Associates, Inc. v. Casarotto, Case No. 95-559).

The Casarotto case involved a situation where arbitration would be denied if the notice of arbitration was not on the first page of the contract and thus is dissimilar to this case, a Volt-like case involving the rules under which an arbitration will take place. This Court's recent holding in Casarotto, AIC believes, evidences that there is no blanket FAA pre-emption of all state laws. In fact, this Court distinguished Volt and Casarotto in that in Volt the state rule determined only the procedural issues; it did not affect the enforceability of the arbitration agreement itself. Of course, here the enforceability of the arbitration agreement is not at issue.

It appears clear, in any event, that this Court is still trying to come to terms with the extent of the pre-emptive effect of the FAA and considering the dissenting opinions of Chief Justice Rehnquist and Justices O'Connor, Thomas, and Scalia, it is this type of case which gives the Court a clear-cut vehicle for clarifying such an important issue.

The reason the distinction between federal law and state law is so important in this case is that AIC believes that Okla. Stat. tit. 23, §9 simply does not give arbitrators the power to award punitive damages. However, even if it did so, it is clear that the arbitrators deprived AIC of its due process rights by wholly disregarding the specific wording of that statute which by its very terms "shall be strictly construed" (emphasis added). The award of punitive damages in this case ($100,000.00) obviously exceeded the

amount of actual damages ($40,500.00) without any "finding" by the "Court" that:

> There is clear and convincing evidence that [AIC] is guilty of conduct evincing a wanton or reckless disregard for the right of another, oppression, fraud or malice, actual or presumed... (emphasis added).

Okla. Stat. tit. 23, §9.

The arbitrators' award of pre- and post-judgment interest and attorneys fees were apparently both predicated upon Okla. Stat. tit. 71, §408, which provides as follows in subsection (a)(2)(4):

> [I]n the case of an offer or sale of a security by such means [described in §408(a)(2)]...the person buying the security may sue at law or in equity to recover the consideration paid for the security together with interest at ten percent (10%) per year from the date of payment, costs, and reasonable attorneys fees ... (emphasis added)

As such, it is clear that interest and attorneys fees can be awarded only in a suit at law or in equity. No reference is made to arbitration proceedings. Thus, the award of interest and attorneys fees by the arbitrators in this matter clearly exceeded their statutory power. Thorneburg Hosiery Co. v. G.L. Wilson Building Company, 381 S.E.2d 718 (N.C. App. 1989) (since attorneys fees were expended in

arbitration not litigation, actual attorneys fees in the arbitration were not recoverable).

This is especially true in Oklahoma as Oklahoma's controlling arbitration statute, Okla. Stat. tit. 15, §810 (part of the Uniform Arbitration Act), specifically excludes attorneys' fees from being included in an arbitration award:

> Unless otherwise provided in the agreement to arbitrate, the expenses and fees of the arbitrator, together with other expenses, not including counsel fees incurred in the conduct of the arbitration, shall be paid as provided in the award. (emphasis added)

Therefore, it is clear that, by applying Oklahoma law, the award of punitive damages, interest, and attorneys' fees in this case was improper.

2. Due Process

AIC also believes there are significant constitutional issues implicated by this case as arbitrators in Oklahoma appear to have the unfettered right to award any amount of punitive damages (without having to comply with Okla. Stat. tit. 23, §9) and any amount of attorneys fees (See, Okla. Stat. tit. 15, §812 (or, even if the FAA applies, 9 U.S.C. §1) for the sole, limited grounds to challenge an arbitrator's decision) without any avenue for meaningful review.

This Court in Oberg v. Honda Motor Company, 114 S. Ct. 2331 (1994), has held that any statutory system which does not adequately safeguard against arbitrary awards of punitive damages is violative of the Fourteenth Amendment's

Due Process Clause. In that case, the State of Oregon had, by statute, only provided limited judicial review of the size of punitive damages awards. This Court held as follows:

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time. For these reasons, we hold that Oregon's denial of judicial review of the size of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment. [footnote omitted]

In the concurring opinion of Justice Breyer, Justice O'Connor and Justice Souter in BMW of North America, Inc. v. Gore, 1996 WL 2622429 (U.S.), this logic was repeated:

> The reason flows from the Court's emphasis in Haslip upon the Constitutional importance

of legal standards that provide "reasonable constraints" within which "discretion is exercised," that assure "meaningful and adequate review by the trial court wherever a jury has fixed the punitive damages" and permit "appellate review [that] makes certain that the punitive damages are reasonable in their amount and rationale in light of their purposes to punish what has occurred and to deter its repetition." [Haslip] at 20-21. See also [Haslip] at 18 ("[U]nlimited jury discretion--or unlimited judicial discretion for that matter--in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities").

This constitutional concern, itself harkening back to the Magna Carta arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion. Daniels v. Williams, 474 U.S. 327, 331 (1986); Dent v. West Virginia, 129 U.S. 114, 123, 9 S. Ct. 231, 32 L. Ed. 623 (1889). Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the

> essence of law itself. See Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112, 69 S.Ct. 463, 93 L. Ed. 533 (1949) (Jackson, J., concurring).

Even a cursory review of either the Oklahoma or federal statutes setting forth the standards of the review of arbitration awards shows that, beyond any doubt, the requisite level of judicial review was simply not available to AIC to contest the propriety of the punitive damages awarded by the arbitration panel. This is even more egregious here because it is clear from the lower court decisions that, even though Okla. Stat. tit. 23, §9 is the law of Oklahoma in regard to awarding punitive damages, it was not utilized here. Even had it been used, because of the limited standard of review of Okla. Stat. tit. 15, §812 (or 9 U.S.C. §1) AIC would have been deprived of its due process rights.

In Oklahoma, furthermore, because of Art. 23 §8 of the Oklahoma Constitution, those due process rights cannot be waived by agreeing to submit to arbitration:

> Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.

Although not part of the opinion of the Eighth Circuit, the concurring and dissenting comments of Judge Beam in Lee v. Chica, 983 F.2d 883 889 (8th Cir. 1993), nicely capture the fundamental inconsistency between the

nature of arbitration and the due process requirements for awards of punitive damages:

> Finally [Pacific Mutual Life Insurance Co. v.] Haslip [111 S. Ct. 1032 (1991)] is about due process and protections that must be employed for punitive damages to be permissible in any event. In the arbitration setting we have almost none of the protections that fundamental fairness and due process require for the imposition of this form of punishment. Discovery is abbreviated if available at all. The rules of evidence are employed, if at all, in a very relaxed manner. The factfinders (here the panel) operate with almost none of the controls and safeguards assumed in Haslip. The proceeding at issue in Haslip was conducted in the Alabama State Supreme Court system with full appellate review. Here, as noted by the opinion of the court, the scope of the review of the arbitrator's award is narrowly limited if not almost nonexistent.

AIC believes one additional reason exists why state law should control. The Tenth Amendment to the United States Constitution provides:

> Powers reserved to states or people:
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the

> States, are reserved to States, respectively, or to the people.

The purpose of the Tenth Amendment was to allay fears that the national government might seek to exercise powers not granted to it and that states might not be able to exercise fully their reserved rights. United States v. Darby, 312 U.S. 100 (1941). Even in commerce among states, the power of a state to promulgate regulations is not taken away until Congress enters and covers a field. Commonwealth v. Perkins, 342 Pa. 529, 21 A.2d 45, aff'd, 314 U.S. 586 (1941). Governments of states are sovereign within their territory save only as they are subject to prohibitions of the United States Constitution or if their actions in some way conflict with the powers delegated to the national government or with congressional legislation enacted in exercise of those powers. Parker v. Brown, 317 U.S. 341 (1943).

Admittedly, the Federal Arbitration Act is an exercise of the federal government's Commerce Clause powers; and, if it so chose, Congress could actually have pre-empted any state law affecting arbitration of disputes arising from interstate commerce. This Court in Volt, however, has explicitly held that Congress did not choose to do so.

CONCLUSION

AIC believes this case is one of critical importance. As evidenced by the increased popularity of non-trial methods of dispute resolution such as arbitration, parties with differences are choosing less-expensive, less time-consuming alternatives which significantly help to unburden the courts. By selecting arbitration, however, a litigant should not thereby be deprived of all due process or protection which the state law affords in litigation. To take such an approach is to discourage parties from seeking alternative means of resolving disputes. If arbitrators have unfettered, essentially unreviewable, powers to award all damages as a matter of right, the use of arbitration will be greatly curtailed, if it is used at all.

WHEREFORE, for these reasons, AIC respectfully requests that this Court grant its Petition for Writ of Certiorari.

Respectfully Submitted,

Norman M. Krivosha
Counsel of Record for Petitioner
David M. Williams
5900 "O" Street/PO Box 81889
Lincoln, NE 68501
(402) 467-7176

APPENDIX

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Steven M. Slinkard

92-03295

Name of Respondents

Donaldson Lufkin & Jenrette Securities
Ameritas Investment Corporation
Steven Dale McQueen

REPRESENTATION

For Claimant at the hearing: Jerry L. Colclazier, Esq. of Colclazier, Rose & Associates, P.C., Seminole, Oklahoma.

For Respondents, Ameritas Investment Corporation at the hearing: Rodney K. Vincent, Esq. of Ameritas Investment Corporation, Lincoln, Nebraska. For Respondent Donaldson Lufkin & Jenrette Securities at the hearing: Joseph Donnelly, Esq. of Donaldson Lufkin & Jenrette Securities, New York, New York. For Respondent, Steven Dale McQueen at the hearing: Pro Se.

CASE INFORMATION

Statement of Claim filed: September 28, 1992. First Amended Claim filed: June 10, 1993. Claimant's Submission Agreement signed on: September 14, 1992.

Joint Statement of Answer filed by Respondents, Ameritas Investment Corporation and Donaldson Lufkin & Jenrette Securities Corporation on: December 8, 1992. Respondent, Donaldson Lufkin & Jenrette Securities Corporation's Submission Agreement signed on: December 7, 1992.

HEARING INFORMATION

Hearing Dates/Sessions: September 20, 1993 for three (3) sessions;
September 21, 1993 for two (2) sessions;
September 22, 1993 for two (2) sessions;
September 23, 1993 for three (3) sessions.

Hearing Location: Oklahoma City, Oklahoma

CASE SUMMARY

Claimant Steven Slinkard ("Slinkard") alleged the following counts against Respondents Ameritas Investment Corporation ("Ameritas"), Donaldson Lufkin & Jenrette Securities Corporation ("DLJ") and Steven McQueen ("McQueen") as agent for Ameritas and DLJ: Count 1: Sale

of Unregistered Securities (Investment Contracts) In Violation of Section 301 and 408(a)(1) of the Oklahoma Securities Act; Count II: Sale of Securities (investment Contracts) through Misrepresentations and Omissions in violation of Section 408(a)(2) of the Oklahoma Securities Act; Count III: Sale of Securities by An Unregistered Agent in violation of Section 201(a) and Section 408(a)(1) of the Oklahoma Securities Act; Count IV: Commission of Fraud by an Investment Adviser in Violation of Section 408(c)(2) of the Oklahoma Securities Act; Count V: Violation of Broker-Dealer Rules; Count VI: Breach of Fiduciary Duty; Count VII: Conversion; Count VIII: Common Law Fraud; and Count IX: Negligence.

Slinkard, in his Amended Claim, alleged the following counts against Respondents Ameritas, DLJ, and McQueen: Count I: Sale of unregistered Securities (Investment Contracts) in Violation of Section 301 and 408(a)(1) of the Oklahoma Securities Act; Count II: Sale of Securities through Misrepresentations and Omissions in Violation of Section 408(a)(2) of the Oklahoma Securities Act; Count III: Breach of Fiduciary Duty; Count IV: Common Law Fraud; Count V: Gross Negligence.

Respondents, Ameritas and DLJ, generally denied the counts as set forth in the Statement of Claim. Ameritas and DLJ specifically denied that Slinkard was their customer in connection with any of the transactions set forth in the claim and denied that McQueen acted as an agent or had any contractual relationship with Ameritas and/or DLJ.

RELIEF REQUESTED

Claimant requested actual damages as set forth at 71 Okl. Stat. Section 408(a)(2)(A), which is the return of all money invested with McQueen, equal to the sum of $42,700.00, together with interest at ten percent (10%) per year from the date of payment, together with costs and a reasonable attorneys fee plus exemplary damages in excess of $100,000.00 and such other and further relief that the arbitrator deems fair and equitable.

Respondents Ameritas and DLJ requested that the claim be dismissed and that all claims be denied and that they be awarded costs and attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

Respondents, Ameritas Investment Corporation and Steven Dale McQueen did not file with the NASD properly executed submissions to arbitration but are required to submit to arbitration pursuant to Section 8 of the NASD Code of Arbitration Procedure and having answered the claim, appeared and testified the hearing, are bound by the determination of the panel on all issued submitted.

Respondent McQueen did not file an Answer to the Statement of Claim. However, the panel determined that McQueen was properly served with the Statement of Claim and also had proper notice of the hearing.

Prior to the hearing, respondent Donaldson Lufkin & Jenrette Securities was dismissed by the Claimant from the claim.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

The panel found Respondents, Ameritas Investment Corporation and Steven Dale McQueen, jointly and severally liable on the following counts as set forth in the amended claim: sale of non-registered securities, sale of securities through misrepresentations and omissions, breach of fiduciary duty, fraud, and gross negligence.

1. Respondents, Ameritas Investment Corporation and Steven Dale McQueen are jointly and severally liable for and shall pay to the Claimant, Steven Slinkard, actual damages in the amount of Forty Thousand Five Hundred Dollars and No Cents ($40,500.00);

2. Respondents, Ameritas Investment Corporation and Steven Dale McQueen are jointly and severally liable for and shall pay to the Claimant, Steven Slinkard, interest in the amount of Twenty Two Thousand Four Hundred Seventy Six Dollars and Seventy Cents ($22,476.70). (This interest was determined from the date of damage up to the date of judgment.) Respondents, Ameritas Investment Corporation and Steven Dale McQueen also shall continue to be jointly and severally liable for paying interest on the actual damages of $40,500.00 at 10% per annum from September 23, 1993 until the actual damages are paid in full.

3. Respondents, Ameritas Investment Corporation and Steven Dale McQueen are jointly and severally liable for and shall pay to the Claimant, Steven Slinkard, punitive damages in the amount of One Hundred Thousand Dollars and No Cents ($100,000.00). The panel awarded punitive damages under the authority of Okl. Stat. Tit. 23 Section 9;

4. Respondents, Ameritas Investment Corporation and Steven Dale McQueen are jointly and severally liable for and shall pay to the Claimant, Steven Slinkard, attorneys' fees in the amount of Seventy One Thousand Four Hundred Fifty Two Dollars and Thirteen Cents ($71,452.13). The panel awarded attorneys' fees under the authority of Okl. Stat. Tit. 71 Section 408;

5. Respondents, Ameritas Investment Corporation and Steven Dale McQueen are jointly and severally liable for and shall pay to the Claimant, Steven Slinkard, costs in the amount of Four Thousand One Hundred Forty Two Dollars and Seventy Six Cents ($4,142.76).

Forum Fees

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed:

10 sessions X $750 = $7500 minus hearing session deposit of $750 = net $6750 due.

The additional forum fees are assessed against Respondents Ameritas Investment Corporation and Steven Dale McQueen, jointly and severally, in the amount of $6750 and are payable to the National Association of Securities Dealers, Inc.

By the Arbitration Panel:

Dated:

December 7, 1993 — Kelley Cornelius
Kelley L. Cornelius, Esq.,
Presiding Public Arbitrator

December 8, 1993 — John Ulrey
John E. Ulrey, Sr.
Public Arbitrator

December 8, 1993 — Anne Long-Larsen
Anne M. Long-Larsen
Industry Arbitrator

Date Award Served By The NASD: December 9, 1993

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

STEVEN M. SLINKARD, an individual; WYNN CONSTRUCTION COMPANY INC., WYNN CONSTRUCTION CO. PROFIT SHARING PLAN; SCOTT BELDON AND JUDY G. PIPER, now BELDON; SUMMIT ADDITION HOMEOWNERS ASSOCIATION, INC., d/b/a SUMMIT CONDOMINIUMS; DAVID M. and PHYLLIS E. BATTLE; WANDA PIPER; CORNELIA DeBELL; DANIEL R. KETCHUM,III; GLEN E. BILLEN AND DOROTHY J. BILLEN; CRISTI A. BRYANT; PREMIER CAPITAL CORPORATION; MEDICAL REGULATORY INCORPORATED,	)
Plaintiffs,	)

v.	)	Case No. CJ-91-2218-61
STEVEN DALE McQUEEN, an individual; PREMIER FINANCIAL ADVISORS, INC., an Oklahoma Corporation; AMERITAS INVESTMENT CORP., a Nebraska Corporation a\k\a BLN INVESTMENT CORP., and DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, a Corporation,	)	
Defendants.	)	

JUDGMENT

The cause is before the Court this 11th day of March, 1994, on Defendants' Motion to Vacate Arbitration Award and on Plaintiff's Motion to Affirm Arbitration Award rendered in favor of the Plaintiff Steven M. Slinkard and against the Defendants Ameritas Investment Corp. and Steven Dale McQueen, on December 9, 1993. Plaintiff appears by and through his counsel of record, Jerry L.

Colclazier and Joseph C. Long. Defendant Ameritas Investment Corp. appears by and through their counsel James M. Chaney, Norman Krivosha, and David M. Williams. The Court, having considered the briefs and arguments of counsel, and being fully advised, finds that the Federal Arbitration Act applies to this matter. Pursuant to the Federal Arbitration Act, the arbitrators did not exceed their authority and therefore Defendants' Motion to Vacate is denied and Plaintiff Slinkard's Motion to Affirm is granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, Steven M. Slinkard, have and recover judgment of and from the Defendants Ameritas Investment Corp. and Steven Dale McQueen, jointly and severally, for the sum of $40,500.00 actual damages, $22,476.70 prejudgment interest, $100,000.00 punitive damages, $71,452.13 attorney's fees, and $4,142.76 costs, for the total sum of $238,571.59, for all of which let execution issue.

Dated this 29th day of March, 1994.

s/John M. Amick
JUDGE OF THE DISTRICT COURT

APPROVED:

s/Jerry L. Colclazier
Jerry L. Colclazier
COLCLAZIER, ROSE & ASSOCIATES
404 North Main Street
Seminole, OK 74868

ATTORNEY FOR THE PLAINTIFFS

s/James M. Chaney
James M. Chaney
John R. Preston
KIRK & CHANEY
101 Park Avenue, Suite 800
Oklahoma City, OK 73102

- and -

Norman Krivosha
David M. Williams
In-House Counsel
P.O. Box 81889
Lincoln, NE 68501-1889

ATTORNEYS FOR AMERITAS INVESTMENT CORP.

I, TOM PETUSKEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 29 day of March, 1994.

TOM PETUSKEY, Court Clerk

s/Joe W Deputy

RELEASE FOR PUBLICATION BY ORDER OF COURT OF APPEALS
THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
OCT 31 1995
JAMES W. PATTERSON
CLERK
Case Number 83,376

STEVEN M. SLINKARD, an individual,

Appellee,

versus

AMERITAS INVESTMENT CORP., a Nebraska corporation, a/k/a BLN INVESTMENT CORP.,

Appellants.

APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE JOHN M. AMICK, JUDGE

AFFIRMED IN PART AND REVERSED IN PART

James M. Chaney,
John R. Preston,
Thomas J. Daniel, IV,
Kirk & Chaney,

Oklahoma City, Oklahoma, and

Norman Krivosha,
David M. Williams,
In-House Counsel,
Lincoln, Nebraska, For Appellant,

Joseph C. Long,
Norman, Oklahoma, and

Jerry L. Colclazier,
Colclazier, Rose & Assoc.,
Seminole, Oklahoma, For Appellee.

MEMORANDUM OPINION

GARRETT, Chief Judge:

Appellant, Ameritas Investment Corp., a Nebraska Corporation, a/k/a BLN Investment Corp. (Ameritas), brings this appeal from the trial court's order affirming a December 9, 1993, arbitration award. The trial court's March 11, 1994, Judgment [filed March 29, 1994] in favor of Appellee, Steven M. Slinkard (Slinkard) awarded him actual damages, prejudgment interest, punitive damages, attorney fees and costs from Ameritas and Steven Dale McQueen (McQueen) jointly and severally. McQueen is not a party to this appeal.

The Judgment also provides:

> Pursuant to the Federal Arbitration Act, the arbitrators did not exceed their authority and therefore Defendants' Motion to Vacate is

denied and Plaintiff Slinkard's Motion to Affirm is granted.

Ameritas contends the Federal Arbitration Act (FAA) does not preempt state law in this case. It claims that because arbitrability is not an issue, and Oklahoma's arbitration law is not inconsistent with the FAA, state law is the appropriate law to apply. It contends the petition raised only state law claims and was filed in an Oklahoma state court. It also contends because of the Option Agreement which the parties executed; because the case was filed in state court; and because the petition raised only state law claims, arbitration was governed by the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. (NASD) and the Oklahoma Uniform Arbitration Act (the Act), 15 O.S. 1991 §801 et seq. It also contends the Option Agreement does not give arbitrators any authority except to award actual damages, and does not authorize an award of punitive damages, interest or attorneys' fees. Paragraph 13 of the Option Agreement provides:

> 13. It is agreed that any controversy between us arising out of your business or this agreement, except for those disputes between us arising under the federal securities laws which are or are held to be non-arbitrable as a matter of law, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or any other national securities exchange on which a transaction giving rise to the claim

took place or pursuant to the Code of Arbitration Procedures of the National Association of Securities Dealers, Inc., as the undersigned may elect. Arbitration must be commenced by service upon the other party of a written demand for arbitration or a written notice of intention to arbitrate, therein electing the arbitration tribunal. In the event the undersigned does not make such election within five (5) days of such demand or notice, then the undersigned authorizes you to do so on behalf of the undersigned.

The United States Supreme Court held in ***Southland Corp. V. Keating***, 465 U.S. 1, 14-15, 104 S.Ct. 852, 860, 79 L.Ed.2d 1 (1984), that the FAA preempted state law in cases "involving commerce". The Court stated:

> If it is correct that Congress sought only to create a procedural remedy in the federal courts, there can be no explanation for the express limitation in the Arbitration Act to contracts "involving commerce." 9 U.S.C. §2.... We would expect that if Congress, in enacting the Arbitration Act, was creating what is thought to be a procedural rule applicable only in federal courts, it would not so limit the Act to transactions involving commerce. On the other hand, Congress would need to call on the Commerce Clause if it intended the Act to apply in state courts. Yet at the same time, its reach would be

> limited to transactions involving interstate commerce. We therefore view the "involving commerce" requirement in §2, not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts. (Citation omitted).

9 U.S.C. §2 provides:

> §2 **Validity, irrevocability and enforcement of agreements to arbitrate.**
>
> A written provision in any maritime transaction or a contract evidencing a transaction ***involving commerce*** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (Emphasis added).

The Option Agreement executed in the instant case is the contract, and the wired transmissions between Oklahoma City and New York are sufficient to satisfy the "involving commerce" requirement of section 2. See ***Mayaja v. Bodkin***, 803 F.2d 157 (5th Cir. 1986), ***rev'd on other***

grounds sub nom. Shearson Lehman Brothers v. Mayaja, Inc., 482 U.S. 923 (1987); ***Gruntal & Co., Inc. v. Steinberg***, 854 F.Supp. 324 (D.N.J. 1994), affirmed 46 F.3d 1116.

Citing ***Allied-Bruce Terminix Companies, Inc. v. Dobson***, ___ U.S. ___, 115 S.Ct. 834 (1995), Division 4 of this Court examined the "involving commerce" language of section 2, in ***Southern Oklahoma Health Care Corp. d/b/a Memorial Hospital of Southern Oklahoma, v. JHBR-Jones-Hester-Bates-Riek, Inc.***, 900 P.2d 1017 (Okl.App. 1995):

> The *Allied-Bruce Terminix* court held that in order to extend the FAA's reach to the limits of Congress' Commerce Clause power, the "contract *evidencing* a transaction" and "*involving* commerce" language of section 2 should be read broadly. (Emphasis added.) It determined that "involving commerce" as used in section 2 is the "functional equivalent of 'affecting,' " which normally denotes that Congress intended to exercise commerce power to the full, *id.* at ___, 115 S. Ct. at 841 (citing *Russell v. United States*, 471 U.S. 858, 859 (1985)), or a full exercise of constitutional power. ___ U.S. at ___, 115 S.Ct. at 841; *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 395 (1967).

Although the parties could have specified Oklahoma law would apply which would have controlled,[1] they did not do so. Therefore, we agree with the trial court's determination the FAA is applicable to this case, preempting state law.

Next, Ameritas contends the arbitrators were not authorized to award punitive damages. Whether Oklahoma law permits such an award is immaterial, because we have determined Oklahoma law is preempted in the instant case.

Appellees contend a majority of courts agree the federal substantive common law under the FAA allows arbitrators to award punitive damages on two bases:[2] (1) the Supreme Court's preference for arbitration as a legitimate form of dispute resolution, citing ***Shearson/American Express, Inc. v. McMahon***, 482 U.S. 220 (1987); (see also ***Kelley v. Michaels***, 59 F.3d 1050 (10th Cir. 1995)); and (2) under the FAA, the parties, by agreement, may allow the arbitrators to award such damages. Appellees contend both bases of this conclusion are met in this case.

It was stated in ***Mastrobuono v. Shearson Lehman Hutton, Inc.***, ___ U.S. ___, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), that if contracting parties agree to include claims for punitive damages as an issue to be arbitrated, "the FAA

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[1]See ***Merrill Lynch and Co. v. City of Waterbury***, 640 A.2d 122, 34 conn.App. 11 (Conn.App. 1994) and ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jana***, 835 F.Supp. 406 (N.D. Ill. 1993).

[2]The *Garrity* rule, under ***Garrity v. Lyle Stuart, Inc.***, 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976), described as representing a public policy decision that punitive damages should not be awarded except by a court, is offered by Ameritas as authority against punitive damages. Appellees contend this rule is not the preferred authority for the reasons described above.

ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." ***Id.*** at 1216. There was no specific mention of punitive damages in ***Mastrobuono***. similar to the arbitration agreement in the instant case. Contrary to the agreement in the instant case, however, the ***Mastrobuono*** agreement contained a choice of law provision, providing the contract would "governed by the laws of the State of New York." Notwithstanding this inclusion, the Supreme Court ruled the FAA would apply and punitive damages could be awarded. The Court stated, at 1217:

> The choice-of-law provision, when viewed in isolation, may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship. Thus, if a similar contract, without a choice-of-law provision, had been signed in New York and was to be performed in New York, presumably "the laws of the State of New York" would apply, even though the contract did not expressly so state. In such event, there would be nothing in the contract that could possibly constitute evidence of an intent to exclude punitive damages claims. ***Accordingly, punitive damages would be allowed because, in the absence of contractual intent to the contrary, the FAA would pre-empt the Garrity rule.*** (Emphasis added).
>
> ...

At most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards. As we pointed out in ***Volt***,[3] when a court interprets such provisions in an agreement covered by the FAA, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." 489 U.S., at 476, 109 S.Ct., at 1254. See also ***Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.***, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-42, 74 L.Ed.2d 765 (1983).

...

We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast, respondents' reading set up the two clauses in conflict with one another: one foreclosing punitive damages,

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[3] ***Volt Information Sciences, Inc. V. Board of Trustees of Leland Stanford Junior Univ.***, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

the other allowing them. This interpretation in untenable.

Even in the case of an arbitration agreement which specifies New York law, which does not provide for punitive damages, the Supreme Court held punitive damages could be awarded when the FAA applies to the case. See also ***Kelley v. Michaels, supra,***[4] wherein the U.S. Court of Appeals for the Tenth Circuit held directly in accordance with ***Mastrobuono***. In the instant case, in which no such specification of state law is made, there is an even stronger case to be made in favor of allowing arbitrators to award punitive damages. Thus, we hold the arbitrators were within their authority to make the award.

Next, Ameritas contends the district court had no power to award "additional damages", i.e., punitive damages, attorney fees and interest, after the arbitration was concluded. However, the original (March 11, 1994) judgment of the trial court only affirmed the awards made by the arbitrators. The FAA permitted an award of attorney fees. The trial court, on July 1 1994, entered an order allowing Slinkard $9,631.25 additional attorney's fees and $1,618.72 in costs as "additional fees and costs pursuant to the arbitration of this matter." The authority for the additional fees and costs was said to be 71 O.S. Supp. 1992 §408(a)(2)(A).

Ameritas contends the Option Agreement required that any controversy between the parties be submitted to the

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[4] ***Mastrobuono*** and ***Kelley v. Michaels*** are also similar to the instant case in that the arbitration agreements provide that the NASD Rules shall apply.

arbitrators. Slinkard cites §408, supra. We agree with Ameritas and hold the trial court erred in entering its July 1, 1994 order as to additional attorney's fees and costs.

The March 11, 1994 judgment of the trial court, affirming the arbitration award, should be and is affirmed. The July 1, 1994 order of the trial court awarding additional attorney's fees and costs should be and is vacated and reversed. Slinkard's motions to dismiss this appeal and for appeal related attorney fees are denied.

AFFIRMED IN PART AND REVERSED IN PART.

JONES, P.J., concurs; JOPLILN, J., dissents.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STEVEN M. SLINKARD, an individual, Appellee,	)	
v.	)	No. 83,3376
AMERITAS INVESTMENT CORP., a Nebraska corporation, a/k/a BLN INVESTMENT CORP., Appellant.	)	

ORDER

The petition for certiorari is denied. The Court of Appeals' opinion is withdrawn from publication.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 25TH DAY OF MARCH, 1996.

s/Robert C. Lavender
ACTING CHIEF JUSTICE

VOTE ON DENIAL OF CERTIORARI:
WILSON, C.J., KAUGER, V.C.J., LAVENDER, SIMMS, HARGRAVE, OPALA and WATT, JJ., concur. HODGES and SUMMERS, JJ., dissent.

VOTE ON WITHDRAWAL OF OPINION FROM PUBLICATION:

WILSON, C.J., HODGES, LAVENDER, SIMMS, HARGRAVE, OPALA, SUMMERS and WATT, JJ., concur.

KAUGER, V.C.J., dissent.

Okla. Stat. tit. 15, §810

Unless otherwise provided in the agreement to arbitrate, the expenses and fees of the arbitrator, together with other expenses, not including counsel fees incurred in the conduct of the arbitration, shall be paid as provided in the award.

Okla. Stat. tit. 15, §812

A. Upon application of a party, the court shall vacate an award if:

1. The award was procured by corruption, fraud or other illegal means;

2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

3. The arbitrators exceeded their powers;

4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the requirements of this act, as to prejudice substantially the rights of a party; or

5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 3 of this act and the party did not participate in the arbitration hearing without raising the objection.

B. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

C. An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant. If predicated upon corruption, fraud or other illegal means, the application shall be made within ninety (90) days after such grounds are known or should have been known.

D. When vacating the award on grounds other than stated in paragraph 5 of subsection A of this section, the court may order a rehearing before new arbitrators are chosen as provided in the agreement. In the absence of such provision, new arbitrators shall be chosen by the court in accordance with Section 4 of this act. If the award is vacated on grounds set forth in paragraphs 3 and 4 of subsection A of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 4 of this act. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

E. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

Okla Stat. tit. 23, §9

Jury may give exemplary damages, when

A. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply.

B. The provisions of this section shall be strictly construed.

Okla Const. art. 2, §7

No person shall be deprived of life, liberty, or property, without due process of law.

Okla Const. art. 23, §8

Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

9 U.S.C. §2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §10

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

95-1997

No. _____

Supreme Court, U.S.
FILED
JUL 12 1996
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

AMERITAS INVESTMENT CORP., a Nebraska Corporation f/k/a BLN INVESTMENT CORP.,

Petitioner,

v.

STEVEN M. SLINKARD, An Individual,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF OKLAHOMA SUPREME COURT

BRIEF IN OPPOSITION

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July 12, 1996

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TABLE OF CONTENTS

ARGUMENT 1

I. Jurisdiction Under Rule 10(b) and (c) 2

A. Jurisdiction in Connection with the Second Question Presented

B. Jurisdiction In Connection with the First Question Presented

II. Other Factors Which Mitigate Against the Grant of Certiorari 21

CONCLUSION 23

APPENDIX I A-1

APPENDIX II A-3

TABLE OF AUTHORITIES

CASES

Allied-Bruce Terminix Companies, Inc. v. Dobson,
___ U.S. ___, 115 S.Ct. 834,
130 L.Ed.2d 753 (1995) 6, 8, 10, 14

Austern v. Chicago Bd. Options Exch. Inc.,
716 F. Supp. 121, 125 (S.D.N.Y. 1989),
aff'd, 898 F.2d 882 (2d Cir.),
cert. denied, 498 U.S. 850 (1990) 4

Bakk v. Principal Fin. Sec., Inc.,
892 F. Supp. 1206 (D. Minn. 1995) 20

Davis v. Prudential Sec. Inc.,
59 F.3d 1186 (11th Cir. 1995) 4, 16

Dean Witter Reynolds Inc. v. Byrd,
470 U.S. 213, 219-220, 105 S.Ct. 1238,
1241-1242 (1985) 9

Dean Witter Reynolds, Inc. v. Trimble,
166 Misc.2d 40, 631 N.Y.S.2d 215
(N.Y.Sup. Ct., 1995) 17

Elmore v. Chicago & Illinois Midland Ry. Co.,
782 F.2d 94, 96 (7th Cir. 1986) 4

Fahnestock & Co. v. Waltman,
935 F.2d 512 (2d Cir. 1991),
cert. denied, 112 S.Ct. 1241 (1992) 7

Federal Deposit Ins. Corp. v. Air Florida Sys., Inc.,
822 F.2d 833, 842 n.9 (9th cir. 1987) 4

First Options v. Kaplan,
___ U.S. ___, 115 S.Ct. 1920,
131 L.Ed.2d 985 (1995) 6, 14, 18-19

Garrity v. Lyle Stuart, Inc.,
386 N.Y.S.2d 831,
353 N.E.2d 793 (1976) 7, 18, 21

Glennon v. Dean Witter Reynolds,
83 F.3d 132 (6th Cir. 1996) 3

Honda Motor Co. Ltd. v. Oberg,
___ U.S. ___, 114 S.Ct. 2331,
129 L.Ed.2d 336 (1994) 3, 5

In re Arbitration Between Prudential Sec. Inc. and Pesce,
642 N.Y.S.2d 466 (N.Y. Sup. Ct.,
New York County, 1996) 17

In re Estate of Sandefur v. Greenway,
898 S.W.2d 667 (Mo. App. 1995) 17

In re Lester Schwab Katz & Dwyer v. Yukevich,
641 N.Y.S.2d 505 (N.Y. Sup. Ct.,
New York County, 1996) 17-18

Kelley v. Michaels,
59 F.2d 1050 (10th Cir. 1995) 4

Kintzelle v. J.B. & Sons, Inc.,
658 So.2d 130 (Fla. App. 1995) 17

Lee v. Chica,
983 F.2d 883, 889 (8th Cir. 1993) 2, 5

Mastrobuono v. Shearson Lehman Hutton, Inc.,
___ U.S. ___ , ___, 115 S.Ct. 1212,
1217, 131 L.Ed.2d 76, ___ (1995) 6-8, 14-18, 20

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,
460 U.S. 1, 24-25, 103 S.Ct. 927,
941-942 (1983) 9

New England Energy, Inc. v. Keystone Shipping Co.,
855 F.2d 1 (1st Cir. 1988) 6

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S.1, 17, 20-21,
111 S.Ct. 1032, 1042-1043,
1044-1045, 113 L.Ed.2d 1 (1991) 5

Painewebber, Inc. v. Elahi,
1996 U.S.App. LEXIS 15949
(1st Cir. July 3, 1996) 7, 19-20

Painewebber, Inc. v. Bybyk,
81 F.3d 1193 (2d Cir. 1996) 7

Painewebber, Inc. v. Landay,
903 F. Supp. 193 (D. Mass. 1995) 17, 19-20

Park Partners, L.P. v. Connolly,
839 F.2d 837 (1st Cir. 1988) 2

Perry v. Thomas,
482 U.S. 483, 107 S.Ct. 2520 (1987) 14

Prudential-Bache Sec., Inc. v. Tanner,
72 F.3d 234 (1st Cir. 1995) 7

Raytheon Co. v. Automated Business Systems, Inc.,
882 F.2d 6 (1st Cir. 1989) 4

Scherk v. Alberto-Culver Co.,
417 U.S. 506, 511,
94 S.Ct. 2449, 2453 (1974) 9

Shearson Lehman Bros., Inc. v.
Neurosurgical Associates,
896 F. Supp. 844 (S.D. Ind. 1995) 17

Shu-Tao Lin v. McDonnell Douglas Corp.,
742 F.2d 45, 49 n.5 (2d Cir. 1984) 2

Smith Barney Inc. v. Michalsky,
53 F.3d 807 (7th Cir. 1995) 16

Societe Generale de Surveilance v. Raytheon,
643 F.2d 863, 867 (1st Cir. 1981) 2

Southland Corp. v. Keating,
465 U.S. 1, 10,
104 S.Ct. 852, 858 (1984) 9, 14

Todd Shipyards Corp. v. Cunard Line, Ltd.,
943 F.2d 1056 (9th Cir. 1990) 4

Van Gemert v. Boeing Co.,
553 F.2d 812, 813 (2d Cir. 1977) 2

Volt Information Services, Inc. v.
Board of Trustees of Leland
Stanford Junior University,
489 U.S. 468, 109 S. Ct. 1253,
___ L.Ed.2d ___ (1989) 8-9, 11

STATUTES, CODES and OTHER AUTHORITIES

Federal Arbitration Act
9 U.S.C. § 1, et. seq. 7, 24
9 U.S.C. § 2 8

NASD Code of Arbitration Procedure
¶ 3741(e) (1993). 14

Oklahoma Securities Act
Okla. Stat. tit. 71, § 408(a)(2)(A) 13, 16

Oklahoma Uniform Arbitration Act, § 10
Okla. Stat. tit. 15, § 801 ..... 16, 21

The Respondent Stephen M. Slinkard respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Oklahoma Supreme Court's opinion in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

Ameritas should never have filed its petition for certiorari as this case presents none of the traditional grounds for the granting of such writ by this Court. This is a typical man bites dog case illustrating the abuse of the arbitration process by many of the larger brokerage houses. Having demanded disputes with its customers be solved by arbitration through a contract of adhesion and enforcing that right by motion to compel, Ameritas, not liking the results obtained in that arbitration, is seeking to overturn those results by an appeal on the merits. Realizing the arbitration process does not afford it the normal appellate review, Ameritas has attempted to clothe its displeasure with the substantive results of the arbitration in lofty claims of arbitrator abuse of authority, improper pre-emption, and deprivation of due process in an attempt to manufacture jurisdiction for this Court to hear its claims. This attempt fails miserably.

Rule 10 of this Court's Rules outline the three general considerations this Court examines in granting

or denying certiorari. Since this case arose through the Oklahoma state court system, general consideration (a) of Rule 10 is clearly inapplicable.

I. Jurisdiction Under Rule 10(b) and (c).

Ameritas, on page 1 of its Petition, claims jurisdiction under Rules 10(b) and (c). However, a fair reading of the body of its petition fails to reveal any basis for jurisdiction under Rule 10(b). There are no recent decisions of the United States Courts of Appeals that are in conflict with the decision by the Oklahoma Court of Appeals in this case. The Table of Authorities in Ameritas' Petition reveals seven decisions of the Courts of Appeals, it relies upon. Of those, four, *Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir. 1988); *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 n.5 (2d Cir. 1984); *Societe Generale de Surveilance v. Raytheon*, 643 F.2d 863, 867 (1st Cir. 1981); and *Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir. 1977), are imbedded citations found in quotations from other cases.

A. Jurisdiction in Connection with the Second Question Presented

Lee v. Chica, 983 F.2d 883, 889 (8th Cir. 1993), while not noted in their Table of Authorities as such,

is a quote from the concurring and dissenting opinion of Judge Beam. This is the only Court of Appeals decision dealing with the second question presented that the lack of meaningful court review of the arbitrators' award of punitive damages results in a denial of due process to Ameritas.

Mr. Slinkard would point out that the decision of the Oklahoma courts in refusing to reverse the award of punitive damages on this basis is consistent with all of the decisions of the United States Courts of Appeals that his research has found. Most recently, in *Glennon v. Dean Witter Reynolds*, 83 F.3d 132 (6th Cir. 1996), the Sixth Circuit specifically rejected Ameritas' position that the FAA did not provide an adequate standard of review under this Court's decision in *Honda Motor Co. Ltd. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). The court first **assumed** that due process protections attach in the case of review of arbitration awards. It then considered:

> "[W]hether the FAA affords meaningful review to defendant's claim that no evidence supports the arbitration panel's punitive damage award. We conclude that the manifest disregard of the law standard permits vacatur of those punitive damage awards that are supported by no evidence. Since that standard of review would allow vacatur of those awards, it is necessarily

> meaningful review of claims that no evidence supports an arbitration panel's punitive damage award."

83 F.3d at 138.

The issue assumed by the Sixth Circuit was specifically addressed by the Eleventh Circuit in *Davis v. Prudential Sec., Inc.*, 53 F.3d 1186 (11th Cir. 1995). It held that both the award of punitive damages by the arbitrators and the confirmation of such award by the federal district court did not constitute state action so as to trigger due process protection. The court cited *Federal Deposit Ins. Corp. v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th cir. 1987); *Elmore v. Chicago & Illinois Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986); and *Austern v. Chicago Bd. Options Exch. Inc.*, 716 F. Supp. 121, 125 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 882 (2d Cir.), *cert. denied*, 498 U.S. 850 (1990), in support of its position. *See also Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1990); and *Lee v. Chica*, 983 F.2d 883 (8th Cir. 1993).

The Tenth Circuit recently held in *Kelley v. Michaels*, 59 F.2d 1050 (10th Cir. 1995), that an award of punitive damages by arbitrators in the amount of slightly less than twice the actual damages

did not violate due process under the three-tiered approach of this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S.1, 17, 20-21, 111 S.Ct. 1032, 1042-1043, 1044-1045, 113 L.Ed.2d 1 (1991). In the present case, the award was roughly two and one half times the actual damage award.

Therefore, the decision in the present case not to reverse the arbitrators' award of punitive damages based upon due process grounds is clearly **not** in conflict with the decisions of the Courts of Appeals. Instead, the decision is clearly **consistent** with the existing precedent from these Courts. Therefore, Ameritas has not established jurisdiction under Rule 10(b) for the second of its "questions" presented.

These same decisions indicate that the Courts of Appeal find no inconsistency between the award of punitive damages by arbitrators and this Court's decisions in *Honda Motor Co. Ltd. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) or *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). Ameritas has offered no support for such position other than the opinion of Judge Beam in *Lee v. Chica*, 983 F.2d 883, 889 (8th Cir. 1993). Based upon this absence of authority, Mr. Slinkard submits that Ameritas has not shown jurisdiction on this issue under Rule 10(c)

either. The decision in this case is consistent with the teachings of this Court.

B. Jurisdiction In Connection with the First Question Presented.

Ameritas' first question presented, dealing with the pre-emption of Oklahoma state law by the FAA, does not fair any better under Rules 10(b) and (c). As far as Rule 10(b) is concerned, only two decisions of the Courts of Appeal are cited as being in conflict with the decisions in the present case. These cases are from the First Circuit in *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), and the Second Circuit in *Fahnestock & Co. v. Waltman*, 935 F.2d 512 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1241 (1992).

Both cases pre-date what Mr. Slinkard believes are the controlling 1995 decisions of this Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, ___ U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); and *First Options v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). To the extent that the courts of appeals cases conflict with the later decisions by this Court, the decisions of the courts of appeals are no longer good law. For example, in light of this

Court's holding in *Mastrobuono*, the statement in *Fahnestock* that there is no conflict between the FAA and the *Garrity v. Lyle Stuart, Inc.*, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976), case is no longer accurate. Further, Mr. Slinkard believes that these opinions may no longer represent the views of these Circuits in light of the more recent developments by this Court. For more recent views, *see Painewebber Inc. v. Elahi*, 1996 U.S.App. LEXIS 15949 (1st Cir. July 3, 1996); *Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234 (1st Cir. 1995), and *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996).

However, both cases appear to be cited largely for the proposition that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et. seq., does not pre-empt all state law. This is consistent with the statement in the "Questions Presented For Review" section that the first issue for review is the pre-emption of "the entirety of Oklahoma state law . . . by the Federal Arbitration Act." Ameritas attempts to re-enforce this position by stating on p.11 of its Petition: "A major underpinning of Mr. Slinkard's argument has been that all Oklahoma laws are pre-empted by the FAA simply because this case involved interstate commerce."

If, indeed, this was Mr. Slinkard's position, there would not only be a conflict between these two Courts

of Appeals decisions, but also a major conflict with the decision of this Court in *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S.Ct. 1253, ___ L.Ed.2d ___ (1989), and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___ , ___, 115 S.Ct. 1212, 1217, 131 L.Ed.2d 76, ___ (1995). Ameritas would, therefore, clearly have established jurisdiction under both Rules 10(b) and (c).

However, such is not the case. Ameritas has simply created a straw man which it then proceeds to knock down in an attempt to create jurisdiction. Mr. Slinkard has never maintained that the FAA displaces the entire body of state substantive or arbitrative law. His position, which is both simple and logical, is based entirely upon the already established teachings of this Court.

The beginning point is the application of the FAA. As acknowledged by Ameritas in the quoted language, this is a contract involving interstate commerce. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, ___ U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). As such, it clearly comes within the terms of 9 U.S.C. § 2 and is controlled by the FAA.

This Court, in a series of cases, has made several important observations about the FAA and its

interplay with the state law and the state courts. It first identified the purpose of the FAA "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220, 105 S.Ct. 1238, 1241-1242 (1985), "and place such agreements 'upon the same footing as other contracts,'" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 2453 (1974), *quoted with approval* in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. at 474, 109 S.Ct. at 1253. This purpose led it to conclude in *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-942 (1983), that Section 2 of the FAA "create[s] a body of **federal substantive law of arbitrability**, applicable to any arbitration agreement within coverage of the Act." [Emphasis added.]

Finally, *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 858 (1984), held that the FAA pre-empts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Again, *quoted with approval* in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. at 478, 109 S. Ct. at 1255. This holding makes clear that as to **arbitrability of issues**, the contract of

the parties is controlling over any state statute or constitutional provision which is to the contrary.

The Court renewed its earlier positions in 1995 in *Allied-Bruce, supra*, saying:

> [T]his Court [has] decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases. The Court [has] concluded that the Federal Arbitration Act pre-empts state law; and it [has] held that state courts cannot apply state statutes that invalidate arbitration agreements.

115 S.Ct. at 838.

Based upon these holdings, Mr. Slinkard maintains that the FAA pre-empts any state law provision which prevents the parties from submitting any issue they desire to arbitration. In the present case, this means that any Oklahoma substantive law or arbitration provision preventing the parties from arbitrating issues such as punitive damages, attorneys' fees, or pre- or post-judgment interest would be pre-empted by the FAA. State law pre-emption is limited to those state statutory or common law provisions which directly interfere with the parties right to arbitrate any issue. This is a much narrower position than that claimed by Ameritas in its first "Question Presented" as to the total pre-emption. Mr.

Slinkard's position is neither inconsistent with the cited decisions of the Courts of Appeals or this Court.

Mr. Slinkard recognizes one important caveat to the above position created by *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1253, ___ L.Ed.2d ___ (1989). The Court in *Volt* held that the parties may, **by agreement**, replace the FAA as the controlling body of case law. Thus, in *Volt*, the parties elected to be controlled by California law rather than the FAA.

Ameritas incorrectly urges that *Volt* is controlling in the present case. In fact, *Volt* has no application to the present case for one important reason that Ameritas conveniently forgets. It only applies where the parties have agreed to waive application of the FAA. **There is no such waiver in the present case. To the contrary, the agreement between the parties as evidenced by the arbitration agreement itself, the NASD Submission Agreement, Mr. Slinkard's statement of claim submitted to the arbitrators, and the conduct of the parties during the arbitration all indicate that it was the intent of the parties to have the issues of punitive damages, attorneys' fees, and pre- or post judgment interest determined by the arbitrators.**

Paragraph 13 of Ameritas' customer agreement is a broad form arbitration agreement requiring the arbitration of "any controversy between us arising out of your business or this agreement...." See Petitioner's Brief, Appendix 14A, where the Oklahoma Court of Appeals quotes Paragraph 13 in full. Further, Ameritas signed the Uniform Submission Agreement which provides in Paragraphs 1 and 3:

> 1. The undersigned parties hereby **submit the present matter in controversy, as set forth in the attached statement of claim, answers, cross claims and related counterclaims and/or third party claims which may be asserted, to arbitration** in accordance with the Constitution, By-laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.
>
> * * *
>
> 3. * * * The undersigned parties further agree and understand that the arbitration will be conducted in accordance with the Constitution, By-laws, Rules, Regulations and/or NASD Code of Arbitration Procedure of the sponsoring organization.

The signed Uniform Submission Agreement is reproduced in the Appendix at p. App I-1.

The final paragraph of Mr. Slinkard's First Amended Claim, p.15, states:

> "As a result of all of the allegations set forth in the paragraphs, McQueen, and

> Ameritas are liable to Slinkard in actual damages as set forth at 71 O.S. § 408(a)(2)(A), which is the return of all money invested with McQueen, equal to the sum of $42,700, together with interest at ten percent (10%) per year from the date of payment, together with costs and a **reasonable attorneys fee**. Although all securities purchased by Slinkard from McQueen are worthless, Slinkard hereby tender any such securities to McQueen and Ameritas. **Slinkard further requests exemplary damages as specifically set forth herein in an amount in excess of $100,000, plus costs, attorney fees** and such other and further relief that the Arbitrator deems fair and equitable." [Emphasis added.]

Finally, during the course of the arbitration itself both Mr. Slinkard and **Ameritas requested** the arbitrators to award them attorneys' fees under 71 Okla. Stat. § 408(a)(2)(A).

These various documents and actions make clear that it was within the contemplation of the parties that the arbitrators had the power to, and were expected to, address the issues of punitive damages, attorneys' fees, and interest. Under the FAA, such agreement is sufficient authority for the arbitrators to consider the matters, and any state statutory or common law provisions to the contrary are pre-empted.

The correctness of Mr. Slinkard's position is borne out by this Court's decisions in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); and *First Options v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

Mastrobuono makes clear that the parties agreement, not state law, determines the scope of the arbitration or **arbitrability.** It said:

> [W]e think our decisions in *Allied-Bruce, Southland*, and *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520 (1987), make clear that if contracting parties agree to include claims for punitive damages within the issues to arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration. Thus, the case before comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages.

115 S.Ct. at 1215.

The Court also held in *Mastrobuono* that the parties showed the necessary intent to arbitrate punitive damages. In reaching this conclusion, the Court relied upon two things. First, it considered the language of the arbitration clause itself and said:

> [T]his clause strongly implies that an arbitral award of punitive damages is

> appropriate. It explicitly authorizes arbitration in accordance with [National Association of Securities Dealers, Inc.] rules; the panel of arbitrators in fact proceeded under that set of rules. The NASD Code of Arbitration Procedures indicates that arbitrators may award "damages and other relief." NASD Code of Arbitration Procedure ¶ 3741(e) (1993). While not a clear authorization of punitive damages, this provision appears broad enough at least to contemplate such a remedy. Moreover...a manual provided to NASD arbitrators contains this provision:
>
> B. Punitive Damages
>
> The issue of punitive damages may arise with great frequency in arbitrations. Parties to arbitration are informed that arbitrators can consider punitive damages as a remedy.
>
> Thus, the text of the arbitration clause itself surely does not support--indeed contradicts --the conclusion that the parties agreed to foreclose claims for punitive damages. 115 S.Ct. at 1218.

Second, the Court applied the common law rule of contract construction that any ambiguity in the agreement should be construed against the interest of the party who drafted it. *Id.* at 1219.

These facts are all present in case at bar. The arbitration agreement is the same. It was an NASD arbitration, and the arbitrators and the parties had the

same NASD manuals. Finally, Ameritas, not Mr. Slinkard, drafted the arbitration agreement and sought to arbitrate the claims.

The *Mastrobuono* analysis applies equally to attorneys' fees and prejudgment interest. As will be seen below, Mr. Slinkard does not believe the Oklahoma Uniform Arbitration Act § 10, 15 Okla. Stat. (1991) § 810, or Oklahoma Securities Act § 408(a)(2)(A), 71 Okla. Stat. (1991) § 408(a)(2)(A), prohibit the arbitrators from awarding either attorneys' fees or pre- or post-judgment interest. In the present case, the Oklahoma Court of Appeals specifically held that post-judgment attorneys' fees had to be awarded by the arbitrators and neither party appealed this holding. However, to the extent that these provisions could be interpreted to prevent such awards, then under the rationale of *Mastrobuono*, they are pre-empted by the FAA.

As did the Oklahoma Court of Appeals in the present case, virtually every state and federal court to consider the issue has followed *Mastrobuono* and confirmed the arbitrators' award of both punitive damages and attorneys' fees. *See e.g. Davis v. Prudential Sec. Inc.*, 59 F.3d 1186 (11th Cir. 1995) (punitive damages); *Smith Barney Inc. v. Michalsky*, 53 F.3d 807 (7th Cir. 1995) (punitive damages);

Painewebber v. Landay, 903 F. Supp. 193 (D. Mass. 1995) (punitive damages); *Shearson Lehman Bros., Inc. v. Neurosurgical Associates*, 896 F. Supp. 844 (S.D. Ind. 1995) (both punitive damages and attorneys' fees); *In re Estate of Sandefur v. Greenway*, 898 S.W.2d 667 (Mo. App. 1995) (punitive damages); *Kintzelle v. J.B. & Sons, Inc.*, 658 So.2d 130 (Fla. App. 1995) (punitive damages).

Against this impressive list, Ameritas can cite only one case, the decision from a New York trial court, in *Dean Witter Reynolds, Inc. v. Trimble*, 166 Misc.2d 40, 631 N.Y.S.2d 215 (N.Y.Sup. Ct., 1995), refusing to follow this Court's decision in *Mastrobuono* holding that the FAA does not pre-empt New York law in the case of punitive damages. However, two more recent New York decisions, *In re Arbitration Between Prudential Sec. Inc. and Pesce*, 642 N.Y.S.2d 466 (N.Y. Sup. Ct., New York County, 1996), and *In re Lester Schwab Katz & Dwyer v. Yukevich*, 641 N.Y.S.2d 505 (N.Y. Sup. Ct., New York County, 1996), have followed *Mastrobuono* and held that arbitrators can award both attorneys' fees and punitive damages under the FAA in spite of the prohibitions of New York law. The court in *In re Arbitration Between Prudential Sec. Inc. and Pesce*, *supra*, simply stated: "This court is bound to apply *Mastrobuono* and the

issue of punitive damages is left to the arbitrators to decide." Id. at 468.

The *Yukevich* case is directly in point because the parties had signed no conflict-of-law clause. The court stated:

> *Mastrobuono*, is instructive with regard to the facts presented in this case--where the agreement contains no choice of law provision and mandates that all controversies be submitted to arbitration. In a situation such as this, the Supreme Court held that:
>
> > . . ., there would be nothing in the contract that would possibly constitute evidence of an intent to exclude punitive damages claims. Accordingly. punitive damages would be allowed because, in the absence of contractual intent to the contrary, the FAA would preempt the *Garrity* rule. Id. at ___, 115 S.Ct. at 1217.

641 N.Y.S.2d at 506.

In the alternative, if the above analysis does not convince the Court that the parties have specifically agreed to have the arbitrators consider punitive damages, attorneys' fees, and interest, then this Court's decision in *First Options, supra*, supplies a presumption that such matters are to be covered. *First Options* also dispels Ameritas' idea that **arbitrability** involves only the general agreement to arbitrate.

In *First Options*, the Court first held that arbitrability is normally an issue for the courts to determine, unless the parties have clearly submitted this issue to the arbitrators themselves. **Again the parties' contract, not state law, determines this issue.**

The Court then distinguished between **arbitrability in general** and **arbitrability of a particular issue**. Arbitrability in general concerns the question of whether the parties generally agreed to arbitration as a substitute for litigation, while arbitrability of a particular issue refers to whether the parties agreed to arbitrate such specific issues as punitive damages, attorneys' fees and interest. The Court held, in the case of general arbitrability, there is a presumption **against** finding an intent to arbitrate. On the other hand, the Court held, in the case of the scope of individual issues submitted to arbitration, there is a presumption **in favor of arbitrating.** 115 S.Ct. at 1924. *See also Painewebber v. Elahi,* 1996 U.S. App. LEXIS 15949 (1st Cir. July 3, 1996); *Painewebber, Inc. v. Landay*, 903 F. Supp. 193 (D. Mass. 1995).

The Court's analysis in *First Options* makes two points relevant to the present case. First, arbitrability involves **both** a determination of arbitrability in general

and whether the parties have submitted particular issues, such as punitive damages, attorneys' fees, and prejudgment interest to the arbitrators. *Cf. Painewebber, Inc. v. Elahi*, 1996 U.S. App. LEXIS 15949 (1st Cir. July 3, 1996); *Painewebber, Inc. v. Landay*, 903 F. Supp (D. Mass. 1995); *Bakk v. Principal Fin. Sec., Inc.*, 892 F. Supp. 1206 (D. Minn. 1995) (determination of arbitrability itself left to arbitrators). Second, there is a presumption in favor of finding arbitrability of a particular issue. In the present case, this means that Mr. Slinkard is entitled to a presumption that the arbitrators could consider his claims for punitive damages, attorneys' fees, and prejudgment interest. This presumption **is in addition to** the actual evidence found sufficient for such submission in *Mastrobuono*.

This analysis shows that the decision by the Oklahoma courts in the present case is not inconsistent with the decisions of the other state courts, the Courts of Appeals, or this Court. Therefore, Ameritas has not established jurisdiction under either Rule 10(b) or (c). Further, this analysis also indicates the absence of the second major consideration under Rule 10 for the granting of certiorari--that the present case present an "important federal question" which this Court needs to review and

settle. The federal issues presented have already been resolved by this Court and are being satisfactorily applied by the state and lower federal courts. No further guidance from this Court is necessary.

II. Other Factors Which Mitigate Against the Grant of Certiorari.

In order to give some bare credence to these lofty legal claims, Ameritas has ignored several pertinent points which undercut the alleged conflicts over which it urges this Court to take jurisdiction. For example, it claims as one of the issues presented is the pre-emption of the Oklahoma state rule against arbitrators granting punitive damages. As the Oklahoma Court of Appeals opinion in the present case acknowledged, there is no Oklahoma rule on this point. *See* Memorandum Opinion at p. 18A of Petition's Appendix. There simply is no statutory or decisional law as to whether Oklahoma would or would not follow the New York Rule of *Garrity v. Lyle Stuart, Inc.*, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976), and prohibit arbitrators from making an award of punitive damages. Therefore, at this point, there is only a **potential** conflict.

In the same vein, Ameritas ignores the plain language of Oklahoma Uniform Arbitration Act § 10,

15 Okla. Stat. (1991) § 810, the language of which is reproduced in Petitioner's Brief, Appendix, p. 25A. This section does not prohibit the awarding of attorneys' fees by arbitrators. Instead, it merely requires that the agreement to arbitrate provide for the award of such fees. The "agreement" under this section should include not only Paragraph 13 of the Customer Agreement, but also the NASD Submission Agreement, Mr. Slinkard's statement of claim submitted to the arbitrators, and the conduct of the parties during the arbitration. As outlined in the previous point, all of these items viewed, both separately and collectively, make plain that it was the intent of the parties to have the issues of attorneys' fees determined by the arbitrators. Therefore, even if it were to apply, the requirements have been met for the arbitrators to award attorneys' fees under Section 10 of the Oklahoma Act.

While Ameritas no doubt will claim to the contrary that the language of these agreements did not provide the necessary agreement, Mr. Slinkard would point out that Ameritas made this argument in connection with post-award attorney fees. The argument convinced the Oklahoma Court of Appeals which held:

> "Ameritas contends the Option Agreement required that any controversy between the parties be submitted to the arbitrators. Slinkard cites [Section 408 of the Oklahoma Securities Act to support his claim for post--award interest and attorneys' fees]. We agree with Ameritas and hold that the trial court erred entering its July 1, 1994 order as to additional attorney's fees and costs."

Petitioner's Appendix at p. 22A.

CONCLUSION

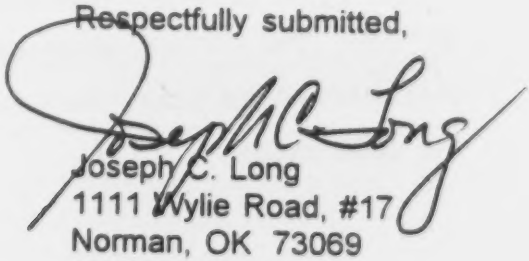
In summary, Ameritas' Petition contains nothing which suggest that this Court should exercise its discretion and grant the requested Writ. Ameritas has not established any kind of a conflict between the decisions of the Oklahoma courts and other state courts, the Courts of Appeal, or this Court which would support jurisdiction under Rule 10(b) or (c). It has not shown that the case presents "an important federal question" on which the guidance of the Court is required. Ameritas has ignored several major factual issues which undercut the validity of the questions it believes are presented. Finally, the decision of the Oklahoma courts appears to be accurate and correct when viewed in light of the precedent of this Court, the lower federal courts, and the state courts.

The Petition, Mr. Slinkard believes, was filed largely for the purpose of further delaying payment of the arbitration award and attempting to prevent the state district court from considering the collateral estoppel effect of such award on the thirteen remaining plaintiffs with essentially identical claims in the original class action suit.

The Petition has no substance. Stripping away the fancy legal claims, this case amounts to nothing more than a thinly veiled attempt by Ameritas to persuade a court to review the arbitrators' decision on the merits, something which the Federal Arbitration Act, 9 U.S.C. § 1 et seq., specifically prohibits. Three Oklahoma state courts have resisted the attempts of Ameritas to undertake a merits review and this Court should as well.

For these reasons, the petition for a writ of certiorari should be denied. Because the Respondent, Mr. Slinkard, believes the Petition for Writ of Certiorari to be frivolous, he requests the Court to award him just damages and double costs under Rules 42 and 43 of this Court.

Respectfully submitted,



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NASD

UNIFORM SUBMISSION AGREEMENT

Arbitration
National Association of Securities Dealers, Inc.
NASD Financial Center
33 Whitehall Street
New York, N.Y. 10004
FAX (212) 858-4389

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Steven M. Slinkard

92-03295

Names of Respondent(s)

Donaldson Lufkin & Jenrette Securities
Ameritas Investment Corporation

---

1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, cross claims and all related counterclaims and/or third party claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

2. The undersigned parties hereby state that they have read the procedures and rules of the sponsoring organization relating to arbitration.

3. The undersigned parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the

Director of Arbitration or the arbitrator(s). The undersigned parties further agree and understand that the arbitration will be conducted in accordance with the Constitution, By-Laws, Rules, Regulations and/or NASD Code of Arbitration Procedure of the sponsoring organization.

4. The undersigned parties further agree to abide by and perform any award(s) pursuant to this Submission Agreement and further agree that a judgment and any interest due thereon may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. IN WITNESS WHEREOF, the parties hereto have signed and acknowledged the foregoing Submission Agreement.

Party(ies) Signature

s/Rodney K. Vincent
Ameritas Investment Corporation

in the case of an offer or sale of a security by such means, to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at ten percent (10%) per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender, less the value of the security when the buyer disposed of it, and interest at ten percent (10%) per year from the date of disposition, or